IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL APPEAL NO.110 OF 1994

1. Jagannath Tukaram Dhiwar
2. Rajendra Jagannath Dhiwar — Appellants (Org.Accd.Nos. 1 and 2)

Vs.

The State of Maharashtra — Respondent

Advocate for appellants absent.
Mr. R.Y. Mirza, APP for State.

CORAM: S.S.PARKAR & S.R.SATHE,JJ.

September 22, 2004.

ORAL JUDGMENT (PER S.S.PARKAR,J.)

1. By this appeal the appellants have challenged the order of conviction recorded against them by the trial Court for offence under Section 302 read with Section 34 of IPC and the sentence of life imprisonment and payment of fine of Rs.300/- each in default R.I. for nine months by the judgment and order dated 6/10/1993 in Sessions Case No.541 of 1995.

2. The prosecution case briefly narrated is as under:

. The incident of assault took place on 14th

June 1991 in the afternoon at about 3.30 p.m. in village Hargude when Nivrutti, the husband of complainant PW 1 Kasturbai was assaulted by the appellants with spades resulting in his death. From the evidence of the complainant it appears that there was dispute about the agricultural land between the deceased and the family of the appellants in the Court in which the deceased had succeeded. On the date of the incident i.e. 14th June 1991 Nivrutti was returning home in the afternoon from the field. The appellant no.1 i.e. accused no.1 obstructed him on the way and he was assaulted by the appellants and other members of his family i.e. wives of the appellants and Prakash, the son of appellant no.1. As per the evidence of PW 1, accused nos.1 and 2 assaulted the deceased with spades on his head and Prakash assaulted him with a sickle on his body. The other accused i.e. Kondhanbai and Chhaya, the wives of accused nos.1 and 2 pelted stones on the deceased. Due to the assault on Nivrutti he received bleeding injuries on head near the ear and back and fell down. PW 1 who was in her courtyard where she had kept grains for drying seeing the assault on her husband rushed to the place of incident which was hardly 100

ft. away from her house. The complainant-wife with the help of other persons who had gathered there lifted the injured Nivrutti and took him near a tree. He was offered water also but he being unconscious did not drink water. He was then taken in a tempo to village Parinche and admitted there in the hospital. At that time police had arrived in the hospital and the complaint of Kasturbai was recorded which is Exh.21 and crime was registered.

3. After receiving medical treatment in Parinche hospital injured Nivrutti was removed to Sassoon Hospital, Pune on the advice of the Medical Officer. He succumbed to his injuries on the following day. The crime was registered on the basis of the complaint of wife Kasturbai and accused nos.1 and 2 were arrested on 15th June 1991 under arrest panchanama Exh.14. The investigating officer Kale went to the spot at about 8 a.m. and drew the spot panchanama Exh.13. He had seized the earth mixed with blood, plain earth and pair of slippers under the spot panchanama. He recorded the statements of about seven witnesses. When the Investigating Officer received the intimation at about 11.30 a.m.

about the injured Nivrutti succumbing to his injuries, he sent his report to add Section 302 of IPC and drew the inquest panchanama (Exh.16) on the dead body and attached the clothes of the deceased under panchanama (Exh.17). He recorded the supplementary statements of the witnesses and thereafter arrested two more accused i.e. Prakash and Chhaya and seized their clothes under panchanama (Exh.15). After their arrest accused nos.1, 2 and 3 volunteered to produce the weapons of assault on 16/6/1991. There was recovery of blood stained spades at the instance of accused nos.1 and 2 and blood stained sickle at the instance of accused no.3 Prakash who was acquitted. The blood stained clothes of the accused were also seized. All the blood stained articles were sent to CA for examination. The blood of the accused persons was also collected and sent to CA for examination. After completion of the investigation charge-sheet was filed in the Court of JMFC, Saswad and the case was committed to the Sessions Court.

4. Before the Sessions Court charge was framed for offences under Sections 147, 148 and 302 of IPC

and alternatively for offences under Section 302 read with Section 34 of IPC and for offence under Section 504 read with section 149 of IPC. Similarly charge was framed for offence under section 506 read with section 34 of IPC. All the five accused had pleaded not guilty before the trial Court. On behalf of the prosecution seven witnesses were examined. PW 1 is Kasturbai, wife of deceased Nivrutti who is eye witness to the incident and had lodged the complaint. PW 2 is Avinash Joshi who acted as panch for the discovery of spade (Article 20) made at the instance of accused no.2 and also for the discovery of sickle at the instance of accused no.3. PW 4 is Sandip Bavdekar who acted as panch for the discovery of spade (Article 21) made at the instance of accused no.1. PW 5 is Dr.Vable who was the Medical Officer in Sasoon Hospital, Pune who performed autopsy on the dead body. PW 6 is Ramchandra Bhilare, Police Head Constable who had taken down the complaint (Exh.21) of Kasturbai and registered the crime. He had also seized the clothes of the deceased under panchanama (Exh.17). Lastly PW 7 is the Investigating Officer API Kale. So far as PW 3 Narhar Rajhuns is concerned, he had turned hostile and his evidence is

not of any assistance to either side. The defence of the accused was of simple denial in their 313 statements. Accused no.1 had however given his complaint (Exh.53) on the date of the incident which was treated as NC complaint. In the said complaint he had mentioned that Nivrutti did not allow him to take bullock cart through the land of Bhagwan Dhiwar claiming that he had taken that land. The quarrel had started between the deceased Nivrutti and accused no.2 Rajendra. Nivrutti gave a blow of spade on his head due to which he sustained injury. Accused no.1 snatched the spade from the hands of deceased Nivrutti and assaulted him on his head and pushed him as a result of which he sustained injury due to fall on the ground.

5. After considering the entire evidence on record the trial Court acquitted accused nos.3 to 5 but convicted accused nos.1 and 2 for offence under section 302 read with section 34 of IPC and sentenced them to suffer life imprisonment and to pay a fine of Rs.300/- each in default RI for nine months by the impugned judgment which is under challenge in this appeal.

6. As the learned Advocate who has filed his appearance on behalf of the appellants was absent when the matter was called out, which was on board since Monday, 6th September 2004, we went through the evidence of all the witnesses with the assistance of the APP appearing for the State and perused the judgment of the trial Court and heard APP in the matter. Though the hearing in the matter commenced today at 11.00 O'Clock and it was over by 1 O'Clock neither the defence Advocate nor anybody on his behalf appears in the matter even until this time when the judgment is in progress.

7. The prosecution is relying on the evidence of eye witness PW 1 Kasturbai and the recovery of blood stained weapons at the instance of the accused-appellants and also the blood stained clothes of the appellants which were seized at the time of their arrest. The prosecution is also relying on the motive.

8. As per the evidence of Kasturbai PW 1 civil suit was filed in the Court in respect of the

agricultural lands between the deceased and the accused which was decided in favour of the deceased Nivrutti. In the complaint lodged by accused no.1 in respect of the incident in question with the police which was filed as NC complaint there is mention about the deceased Nivrutti claiming that he had taken land of Bhagwan Dhiwar and, therefore, was not allowing accused no.1 to take his bullock cart through the said land at the time of the incident. The complainant Kasturbai has deposed that the incident took place about 100 ft. away from her house when Nivrutti was returning home from the field. Since she had spread the grains in her courtyard for the purpose of drying, she was in her courtyard at the relevant time from where she saw her husband being obstructed by the accused persons who assaulted him with weapons like spades and sickle. She has deposed that accused nos.1 and 2 had assaulted the deceased with spades on his head and accused no.3 Prakash had assaulted on the left side of his body with sickle. She immediately rushed to the place of incident and with the help of other persons took the injured Nivrutti to the hospital in the nearby village Parinche. At that time police had

arrived and her complaint was recorded which is Exhibit 21. Her deposition is corroborated by the complaint (Exhibit 21) except that in her complaint name of Prakash, accused no.3 who is the son of accused no.1, was not mentioned who has been acquitted by the trial Court along with other two accused who were ladies and to whom assasult is attributed with the help of stones. The crime was registered on the basis of the complaint of Kasturbai which was recorded immediately after the incident in question when she had taken the injured to the hospital and before he was even shifted to Sasoon hospital at Pune same night.

9. Apart from the fact that her complaint which was filed without any loss of time which has corroborated her deposition in the Court, her evidence is also corroborated by the medical evidence. PW 5 Dr.Vable who conducted the autopsy on the dead body had found following external injuries on the person of the dead body:

> (1) Contused abrasion in the middle of head 2 1/2" anterior to occipital protuberance. Abrasion measuring 1 x 1/2". Surrounding area of 1 1/2" diameter contused.

(2) Tracheostomy wound present.

(3) Stitched wound right side of back 1 1/2" above angle of scapula, 2" long 3 stitches present.

(4) Linear abrasion on posterior aspect of right shoulder joint, horizontal in direction admeasuring 2" - 1/4".

The aforesaid injuries were found on the head of the deceased which according to the Medical Officer were ante mortem and recent. The doctor also noticed following seven internal injuries on the person of the deceased:

(1) Haematoma over right parito occipital and temporal region admeasuring 6 x 4".

(2) Crack fracture starting from right temporal bone extending vertically upwards over parietal bone upto saggital suture 5" long.

(3) Fracture right wing of sphenoid 1" long.

(4) Extradural haemorrahage over right parietal region measuring 3x2".

(5) Subdural haemorrhage over right temporal and parietal lobe measuring 4x2.5".

(6) Contusion of right temporal lobe, measuring 1 1/2" x 1".

(7) Tracheostomy wound present.

The cause of death is due to the head injuries.

According to him the external injury no.1 corresponds to internal injuries mentioned in column no.19 as aforesaid. He has deposed that injury nos.1 and 4 could be caused by the impact of hard and blunt object i.e. butt of the spade. According to him the injuries found on the dead body must have been caused within 24 hours before the death.

10. Apart from the motive, immediate complaint lodged by Kasturbai who was an eye witness and corroborated by medical evidence, there was discovery of blood stained weapons at the instance of accused nos.1, 2 and 3. However, in view of the acquittal of accused no.3, we are concerned with the recovery made at the instance of accused nos.1 and 2. PW 4 Sandip Bavdekar has proved the recovery of spade at the instance of accused no.1. which was hidden under the fodder in the cattleshed of his house. The said spade was found blood stained and is article no.21. The recovery of spade at the instance of accused no.2 was proved by panch PW 2 Avinash Joshi. Accused No.2 Rajendra had produced blood stained spade (Article no.20) from miscellaneous items under the cot which was in the outer room (padvi) of his house. The said

recovery was also made on 16th June 1991 in the afternoon. The evidence of the panchas of recoveries is also supported by the Investigating Officer Kale in his deposition. Both the spades recovered at the instance of the appellants i.e. accused nos.1 and 2 were sent for examination to the CA. As per the CA report (Exh.51) both the spades were stained with blood of group "B" which is that of the deceased.

11. The clothes of the deceased which were sent to CA for examination were also stained with blood group "B". As per the CA report (Exh.46) the blood of accused no.1 which was sent in a phial to CA was of "A" group while as per CA report (Exh.47) the blood of accused no.2 sent in phial to CA was of "O" group. Similarly the blood of accused no.3 was found to be of "A" group. Thus discovery of blood stained spades bearing the blood group of the deceased, which is different from blood groups of accused nos.1, 2 and 3, is also a strong circumstance which supports the case of the prosecution for the involvement of the appellants in the murder of deceased Nivrutti. Even the clothes of appellants were sent to the CA for examination. The clothes of accused no.1, which were

seized under panchanama, were kopri and dhoti. While as per the CA report (Exh.51) kopri of accused no.1 was stained with blood of group "B" which is that of the deceased, the clothes of accused no.2 which were full manila shirt and full pant were also stained with blood. The full manila shirt of accused no.2 was stained with blood group "B" which is that of the deceased though his own blood group is "O" and human blood was found on his full pant.

12. Thus the evidence of eye witness PW 1 Kasturbai is supported by the evidence of motive deposed to by her and corroborated by the immediate complaint lodged by her to the police stating the facts as deposed to by her. It is further corroborated by the medical evidence as well as the recovery of the clothes of the appellants which were stained with blood group of the deceased and the discovery of weapons of spades used for the assault on the deceased by them which were also stained with the blood group of the deceased.

13. In the Court the accused have not taken up the defence that it was a case of exercise of right of

private defence of person by them nor do the circumstances on record justify the exercise of right of private defence of person by the accused. In their 313 statement the accused have simply denied the circumstances operating against them put to them as false. There is no doubt that accused no.1 had lodged complaint (Exh.53) at the police station in which he had stated that the deceased Nivrutti had assaulted him with spade on his head and then accused no.1 snatched that spade from his hands and assaulted Nivrutti on his head as a result of which he fell down and due to the fall he received the injury. From the kind of injuries received by Nivrutti it cannot be said that those injuries were caused due to his fall on the ground. Significantly in the complaint the accused no.1 has admitted that he had assaulted the deceased with spade on his head but after snatching the same from the hands of Nivrutti. Though the accused were not sent for medical examination, it does not appear that they required any treatment to be given for the alleged injuries on their persons. The fact that the complaint of accused no.1 was registered as NC complaint goes to show that it was a case where the injury suffered by

accused no.1 must be very simple and if at all it could have been a case for offence under Section 323 of IPC which is not even a cognizable offence. In his deposition the Investigating officer Kale has stated that before the FIR (Exh.21) was registered the accused had filed complaint which was registered as non-cognizable offence. He has further stated that accused nos.1 and 2 were sent to the hospital for medical examination under police yadi but the medical certificates were not collected. There was not even a suggestion made to the I.O. that any of these appellants had suffered any grievous hurt or there was any major injury on their persons.

14. The complainant Kasturbai in her evidence has deposed that her husband had gone to the field for uprooting the congress grass without any weapon. It is also important to note that the two spades which were recovered at the instance of these appellants were not stained with the blood of the group of the appellants which were "A" and "O" but were stained with blood group "B" which is that of the deceased. Moreover it cannot be forgotten that accused were five in number. Accused no.3 has been acquitted only

because his name remained to be mentioned in the complaint. The assault was attributed to all the three accused who are father and sons. Whether we accept the case of the complainant that it was the accused who had obstructed the deceased Nivrutti or we accept the case put up in the NC complaint of accused no.1 that it was Nivrutti who had objected to the accused taking his bullock cart through the field claimed by Nivrutti as his own, it is the accused who had motive to assault and being more in number were in a position to start assault on Nivrutti. The defence of right of private defence not specifically taken up at the trial by or on behalf of the appellants does not appear to be at all probable on the material and evidence brought on record. We have, therefore, no hesitation in confirming the order of convictions and sentences recorded by the trial court against the appellants-accused.

15. In the result, the order of conviction and sentence passed by the Additional Sessions Judge, Pune on 6/10/1993 in Sessions Case No.541 of 1991 against the appellants is confirmed and the appeal is dismissed. The appellants are directed to surrender

to their bail bonds forthwith.

(S.S.PARKAR,J.)

(S.R.SATHE,J.)